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Supreme Court, U.S.
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No. 97-498

In the
Supreme Court of the United States
October Term, 1997

ANNE L. ALLEN, a/k/a NANCY ALLEN, an incompetent, by ANNE M. ALLEN, her guardian, and ANNE M. ALLEN, in her own right and as personal representative of WALTER E. ALLEN, her deceased husband,
Petitioners,

v.

MONTGOMERY HOSPITAL and PAUL R. CASEY, JR., M.D.,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

REPLY TO BRIEFS IN OPPOSITION

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1A Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses*, § 6.2 at 591
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REPLY

Pennsylvania's classification does discriminate against the mentally ill.

Respondents (primarily Dr. Casey, but to some extent Montgomery Hospital as well), argue against granting the writ by attempting to blur the classification established by the Pennsylvania statute at issue. They also suggest that the classification does not deserve the attention of this court because it does not affect all mentally ill persons, and because in some cases it affects persons who are not mentally ill. Casey Br. in Opp. at 6, 8; Montgomery Hosp. Br. in Opp. at 23. Although this is clever brief writing, it does not withstand careful constitutional analysis.

It is clear that Pennsylvania's Mental Health Procedures Act (the "MHPA"), as interpreted by that state's highest court, operates to deprive petitioner Nancy Allen (a mentally ill person) of her right to non-negligent medical care and the right to sue therefor, simply by reason of her being subject initially to a MHPA treatment decision. From this (and *Albright v. Abington Memorial Hosp.*, 696 A.2d 1159 (Pa. 1997), argued and decided the same day as this case), it follows that Nancy Allen, and all other persons subject to the MHPA who may in the future require medical care, can only expect substandard medical care. Contrary to respondents' assertions, every single mentally ill person in Pennsylvania (or who may enter Pennsylvania) faces this prospect and is affected by the diminished standards set out by the state supreme court in *Allen* and *Albright*.

Now, it is also true that the MHPA operates to endanger some persons who are not mentally ill.[1] But this additional effect of the MHPA immunity does not take away from the fact that, as applied to petitioners' claims, the MHPA classification discriminates invidiously in violation of the equal protection clause. Petitioners have stated a proper equal protection clause challenge that affects them and the thousands of mentally ill persons in need of medical care now and in the future, whether or not this court decides that the equal protection claims of others are not precisely the same as petitioners, and therefore are better left to another case.

The respondents' statutory arguments do not address the question presented, nor do they narrow the Pennsylvania Supreme Court's broad holding.

Respondent Casey develops this theme and attempts to oppose the breadth of the claim stated by petitioners, and to recharacterize the immunity at issue here, by placing the word in quotation marks and referring to it as a limitation of liability. Casey Br. in Opp. at 6, 8. This latter tack is remarkable, given the vigor with which Dr. Casey argued in the state supreme court for a broad immunity, without the use of quotation marks or other devices, and indeed would seem to be precluded by the doctrine of judicial estoppel. *Callanan Road Imp. Co. v. United States*, 345 U.S. 507 (1953);

[1] To wit, mentally healthy persons who are nonetheless alleged to be eligible for involuntary commitment, as well as third parties (regardless of their own mental health) who may be harmed by mentally ill persons who are negligently released or left unsupervised by a treatment decision under the MHPA.

Michels v. Olmstead, 157 U.S. 198 (1895). Having prevailed below in his statutory construction, he cannot now adopt the opposite theory to defend against the constitutional challenge.

Indeed, the precarious nature of respondents' position is belied by their citation to the "adequate treatment" provisions of section 104 of the MHPA. Casey Br. in Opp. at 7; Montgomery Hosp. Br. in Opp. at 2, 12-13. Given the holdings in *Allen* and *Albright* that the treatment need not really be adequate (nor decent, nor safe, nor healthful -- other standards ostensibly required by section 104), the force of respondents' citation is lost. *Albright v. Abington Memorial Hosp.*, 696 A.2d 1159 (Pa. 1997) (in order to surmount the bar of section 114, patients must prove "more egregiously deviant conduct than ordinary carelessness, inadvertence, laxity, or indifference. . . . The behavior of the defendant must be flagrant, grossly deviating from the ordinary standard of care."; without this "gross negligence," patient has no recourse). This, of course, sounds most like a statutory interpretation argument, resolved in favor of respondents by the state's supreme court. The federal question properly presented here (and never fully confronted by either respondent) is whether that remarkably broad immunity construction violates the equal protection clause.

The petitioners have always preserved the federal question presented on this petition.

Dr. Casey also relies on *Cardinale v. Louisiana*, 394 U.S. 437 (1969), for the proposition that

the Pennsylvania Supreme Court was "deprived" of "the opportunity to consider this aspect of the constitutional challenge." Casey Br. in Opp. at 10. A closer reading of the three-page opinion in *Cardinale* discloses that Mr. Cardinale "fail[ed] to raise the issue he presents here *in any way below*." *Id.* at 439. This is hardly true of the petitioners here, who have repeatedly raised and pressed their federal claims in every state court which considered the case, beginning with the pre-trial motion in the trial court, as documented in the petition at notes 4-8.

Court of appeals decisions upholding sovereign immunity statutes do not bear on the question presented on this petition.

Both respondents cite *Kranson v. Valley Crest Nursing Home*, 755 F.2d 46 (3d Cir. 1985), and the hospital further cites *Grimes v. Pearl River Valley Water Supply District*, 930 F.2d 441 (5th Cir. 1991), and *Aubertin v. Board of City Commissioners*, 588 F.2d 781 (1978), in support of the idea that state immunity statutes are constitutionally sound. Even apart from the fact that they were not decided by this court, none of the three cases cited address the question presented in this petition. All three cases dealt with state statutes allowing certain municipal actors (two counties and a water supply district), but not others, sovereign immunity from suits by any party. Thus, those statutes did not single out for special harm any class of people -- all citizens who travelled county roads (*Aubertin*), boated near a district dam (*Grimes*), or were patients in a county nursing home (*Kranson*), were equally at risk. Here, by contrast, the MHPA provides to virtually any

actor immunity from suit by the mentally ill, but not others. If a mentally healthy person had presented herself at the Montgomery Hospital emergency room and exhibited the same symptoms, she would have had a right under Pennsylvania law to expect Dr. Casey and the hospital to meet an ordinary standard of care, and if she had received the same treatment from them as Nancy Allen received, she would have had a right to sue them in negligence for breach of their duty to meet that standard. Pennsylvania denies both of those fundamental rights to Nancy Allen and others subject to the MHPA, and this classification denies them the equal protection of the laws in a way that was not at issue in any of the three cases cited by respondents.

The theme of both respondents that states remain free to create and abolish tort recovery is unobjectionable, but also irrelevant to the petition.[2] The petitioners' claim is not that Pennsylvania can or cannot abolish a tort. Their claim is that it denies equal protection of the laws to permit most people to sue for negligence but to deny that right to those subject to the MHPA.

The respondents never address the underlying fundamental right of the mentally ill to safety and medical care presented in this petition.

Dr. Casey several times states, truthfully, that the jury found that respondents were not *grossly*

[2] In addition to *Kranson*, *Aubertin*, and *Grimes*, the hospital cites *Logan v. Zimmerman Brush Co.* 455 U.S. 422 (1982) and *Martinez v. California*, 444 U.S. 277 (1980), in support of this theme. Both were due process, not equal protection, cases.

negligent. But it must not be forgotten that the jury was prevented from determining whether the respondents were *simply* negligent by the charge to it by the trial judge, who refused to charge on ordinary negligence pursuant to section 114. This is especially important to emphasize in connection with Dr. Casey's citation to *Youngberg v. Romeo*, 457 U.S. 307 (1982), where Dr. Casey suggests that the jury "applied much greater scrutiny" in evaluating whether professional judgment was used. Casey Br. in Opp. at 9-10. Clearly, it did not -- in fact, it was charged that it could not -- which is the whole point of petitioners' challenge. To the extent that respondents rely on *Youngberg*'s language concerning professional judgment, it must be remembered that the statutory vehicle providing a remedy there was 42 U.S.C. § 1983 (1994), with its own requirements applicable to all plaintiffs who seek its remedy. *See* 1A Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses*, § 6.2 at 591 (3d ed. 1997) ("[Section] 1983 itself neither establishes nor creates any rights, but only provides a remedy for the violation of federal rights created by another source, principally some provision in the federal Constitution."). The underlying right recognized in *Youngberg* was therefore not limited to its section 1983 remedy, but was the right to reasonable safety and medical care itself. Here, by contrast, Pennsylvania would allow mentally healthy persons the remedy of holding Dr. Casey and the hospital responsible for their negligent actions, but discriminates against those subject to the MHPA and allows them only substandard treatment and substandard remedies.

The respondents' arguments against the finding of a fundamental right require one additional observation: both respondents attack the existence of a fundamental right to sue in negligence for breach of the duty to provide safety and adequate care, but neither addresses the fundamental right to safety and medical care itself for persons being treated pursuant to the MHPA.[3] There are two fundamental rights (or groups of rights) at issue here: one is the right of the involuntarily committed to medical care, safety, and freedom of movement, as recognized in *Youngberg v. Romeo*, and the second is the preservative right to sue for violations of the first set of rights. The briefs in opposition concentrate their fire on the preservative right, ignoring the fundamental rights underlying it.

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[3] Montgomery Hospital asserts that the right to sue was the only basis for relief set forth by the petitioners in the state courts. Montgomery Hosp. Br. in Opp. at 20. Given that the only way to enforce one's rights is to sue, this seems an odd complaint, but in any event, what petitioners have maintained from the beginning of this controversy is that the application of the MHPA to foreclose their claims violates the equal protection clause of the federal constitution. This is the question presented for review, and the respondents' attempts to distract the court's attention should not be permitted to succeed.

CONCLUSION

For these reasons and those set forth in the petition, petitioners pray that this court issue a writ of certiorari to review this case.

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